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Case No. 92-1788

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1993

IVAN C. REEDER,

Petitioner,

vs.

MARVIN T. RUNYON, POSTMASTER GENERAL
OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court err in granting summary judgment against petitioner on the ground that his speech impairment was not substantially limiting so as to disqualify him from being an "individual with a disability" within the meaning of the Rehabilitation Act, 29 U.S.C. 706(8)(B), as amended.

2. Whether the district court erred in holding that petitioner did not have a cause of action against the Postal Service under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

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PETITIONER'S REPLY TO THE GOVERNMENT'S COMMENTS ON THE STATEMENT OF FACTS

Reeder's opening brief and the government's opposition brief may have created a few areas of confusion as to the facts of this case.

1. There may be some confusion regarding Reeder's employment record with the Postal Service. In Reeder's opening brief, Reeder noted that he began employment with the Postal Service in 1973 and progressed in that employment until 1981. (Pet. brief, page 17).

In the government's opposition brief, in paragraph #1 of its "Statement" [of Facts], the government has tried to put a little different spin on Reeder's employment record by stating, as a fact, that Reeder received several promotions and advanced to a management position having supervisory responsibilities. (Resp. brief, page 2).

The government wants the Court to assume that Reeder has in fact received several promotions and that because Reeder has

received these several promotions and now supervises other employees, he must be able to speak with little problem, and, therefore, his impairment cannot be deemed substantially limiting. This would be an improper inference.

Reeder began employment with the Postal Service in 1973 as a Distribution Clerk. That job had a GS (PS) grade of 5. In 1974, he transferred to the position of Custodial Laborer and as a result of such transfer was required to be reduced in grade to a PS-3. In 1975, he received one of his two promotions - he was promoted from the Custodial Laborer's position of PS-3 to a Clerk's position of PS-5. This was the grade he had when he had first become employed.

In 1979, his grade level was unilaterally upgraded to a PS-6 and the title changed from Clerk to Technician. In 1981, he received the second of his promotions; he was promoted to the position of Maintenance Control Supervisor, from a PS-6 to a PS-14,

an entry level for a postal supervisor. Thus, in nineteen years, Reeder has actually been promoted only twice and only one promotion was a true advancement. There have not been "several" promotions. Reeder has not advanced in employment since 1981.

In the position of Maintenance Control Supervisor, Reeder does supervise several employees.

Reeder testified in his deposition: "I'm in a situation that I have eight people who I've taught to practically read lips, to take non-verbal messages and act on them" and "my type of supervision is to teach my employees how to do everything I do; everything, which means taking my telephone calls too". (Dep. at 182, 187). Reeder himself has made accommodations to enable him to perform his job:

> Q. Okay. So are you saying, to paraphrase you, that the office informally adjusts to the situation, as opposed to taking -- like sending out a memo or directive saying "From here on out Ivan is not going to be speaking; he'll do the administrative

functions," the office just sort of naturally adapts? Is that what you're saying?
A. Yes. (Dep. at 190-191.)

There is no inconsistency between Reeder's record of being able to supervise others and his claims of a substantial limitation on his ability to speak and to advance.

2. There may be some confusion regarding the history of Reeder's speech impairment and his efforts to seek medical treatment thereof. In Reeder's opening brief, he summarized his search for a cure. (Pet. brief at pages 19-21). In the government's opposition brief, in paragraph #2 of its "Statement" [of Facts], the government discusses how the district court analyzed a few selected parts of Reeder's evidence as to his life with his impairment. (Resp. brief at 4).

But describing in the "Facts" section of the opposition brief what the district court did may cause misimpressions. The government wants the Court to assume or conclude that

because Reeder is not currently receiving treatment for his impairment, he didn't receive any treatment in the past. This would be an improper inference.

In his deposition (and in his earlier briefs), Reeder acknowledged that he was no longer actively seeking medical treatment for his condition and explained why. Reeder testified that after surgeries did not prove successful, he began a treatment of injections into his voicebox over a two year period in the early 1980's.

> Apparently he [the doctor performing the injections] had taken some special training and a new procedure was to inject the vocal cords. One of the reasons that I quit seeing him was that first, this injection process is uncomfortable. What they do is take a serum - its a poison, its called botulin which comes from the virus botulism ... They inject it externally and hope that you hit the vocal cord. (Dep. at 164.)

Reeder testified this treatment only worked for a few hours at a time and that sometimes the doctor would miss a vocal cord and the

toxin would go down the esophagus and cause nausea. (Dep. at 164, 165.)

Reeder discontinued this treatment out of pain and frustration, not because it was no longer necessary.

> A. His next procedure was to disconnect the nerves from one vocal cord, in effect doing what the shots would do, except it's permanent.
>
> Q. Okay.
>
> A. That made me think: Well, if it's come to this, I don't want to have to go through this the rest of my life, and if this is the only advancement that they have in this specialty, I'll just suffer through and hope something else comes along which could help it. (Dep. at 165 (emphasis added)).

After reaching that conclusion, Reeder has visited a Dr. Aldrich for general medical problems. But Dr. Aldrich has not treated him specifically for his speech impairment although the medical records (see Pet. brief at page 20) reference the problem and confirm his testimony as to his surgeries.

Such evidence and reasonable inferences to be drawn therefrom establish he had a difficult to analyze impairment which had

necessitated extensive medical testing and treatment.

When asked during his deposition whether he had any medical records, Reeder explained that he may not have kept any medical records but did have billings and cancelled checks. (Dep. at 155.)

Following his deposition, Reeder was requested to furnish medical records (not the billings and checks) either by obtaining the records himself and forwarding them to the Postal Service or by signing releases and forwarding said releases to the Postal Service so that the Postal Service could seek to obtain records by contacting the doctors.

Reeder signed the releases and sent them to the Postal Service. In its district court brief, the Postal Service included only the records of Reeder's most recent general practitioner, Dr. Aldrich, which Reeder stipulated had not even treated him for his speech. Yet, Dr. Aldrich noted the impairment, described it as a "laryngeal

spasm" and confirmed that Reeder had had surgery and that Reeder's voice suffers under fatigue and stress.

3. There may be some confusion regarding the relationship between the temporary assignment ("a detail") Reeder was denied and the position for which he was twice rejected.

The detail in question was a temporary assignment but it involved the same duties as the very position for which Reeder was applying. The person who received the detail later received the promotion. The two opportunities were closely connected.[1]

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[1]Management's reason for the denial of the detail could be viewed as precluding Reeder from advancing:

> A. He [the person selected] was there for the promotion. He's been up there since.
>
> ***
>
> A. The reason I went to him [Reeder's immediate supervisor] is to find out if Dierks had received a promotion or a detail.
>
> Q. Or a detail? Is that what you said, a promotion or a detail?
>
> A. Yes.
>
> Q. Okay. And then told you that he had gotten a detail at that

PETITIONER'S REPLY TO THE GOVERNMENT'S ARGUMENT ON WHETHER REEDER CAN SATISFY THE TEST OF BEING A PERSON WITH A DISABILITY

With respect to the issue of whether Plaintiff's impairment is substantially limiting to a major life activity so as to qualify him as a person with a disability under the Rehabilitation Act, 29 U.S.C. §706(8)(B), the government explains what the district court did and asserts repeatedly that the district court concluded "correctly" that Reeder had failed to aver the specific facts needed to withstand a motion for summary judgment. Beyond that, the government does little to respond to Reeder's arguments.

> point or a promotion or both?
>
> A. Yes. He told me that it was a detail, but his conversation led me to believe that it was a promotion.
>
> ***
>
> A. The impression was that the topic of the meetings was not a detail but it was the promotion. (Dep. at 193, 203, 204 and 205.)

HAVING AN IMPAIRMENT

a. With respect to the issue of "having" a substantially limiting actual impairment, Reeder's argument is that the district court virtually ignored the content of Reeder's deposition (that, for example, Reeder had difficulty getting people to understand him 90% of the time) and instead assumed that if Reeder could speak intelligibly in a deposition, he couldn't have a substantially limiting impairment.

The government accepts this assumption without question. This is a mistake.

A substantial limitation is a limitation, not total inability. A person who is substantially limited may still be able, through a variety of means, to perform successfully all of his major life activities, including speaking in a deposition, but such does not negate his right to coverage under the Rehabilitation Act. A deaf person wearing a hearing aid might be able to participate "normally" in a

deposition but would still be a person with a disability.

Reeder's act of participating in a deposition shouldn't ipso facto preclude his efforts to bring himself under the protection of the Rehabilitation Act.

HAVING A RECORD OF AN IMPAIRMENT

With respect to the issue of having "a record of" a substantially limiting impairment, Reeder's argument is that the district court virtually ignored Reeder's uncontradicted deposition testimony and his responses to discovery requests as to his lengthy and varied history of treatment of his impairment, including two surgeries, two years of injections, and his decision to give up searching for a cure, and instead assumed that if Reeder had not been treated recently for the impairment, as evidenced by some medically documented record, he must, therefore, not have been treated in the past for such an impairment.

The government accepts this assumption wholesale. This is a mistake.

The government equates "having a record of" with having medical records of. One may establish a history of having an impairment in several ways, only one of which is by producing "records".[2]

The Rehabilitation Act doesn't require a plaintiff to obtain and maintain a complete copy of all of his medical records to establish his eligibility. The plaintiff must only produce credible evidence that he has a history of a substantially limiting impairment.[3]

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[2]The regulations define the phrase "has a record of such impairment" as one who "has a history of, or has been misclassified" as having a mental or physical impairment that substantially limits one or more major life activities. 29 C.F.R. § 1613.702.

[3]The government's cursory analysis of the "record of" test conflicts with School Board of Nassau County v. Arline, 480 U.S. 273, 281, 107 S.Ct. 1123, 1127 (1987), wherein the Court held that Arline's:

> "impairment [tuberculosis] was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities

Reeder's evidence was sufficient to establish a fact question as whether he had a substantially limiting impairment in the past.

BEING REGARDED AS HAVING AN IMPAIRMENT

With respect to the issue of "being regarded as" having a handicap, Reeder's argument is that because the Postal Service refused to grant Reeder a detail to a position, in part because of the employer's concern about Reeder's ability to speak, a factfinder could reasonably conclude that the employer perceived his impairment as severely limiting his ability to perform in any positions which included a significant amount of speaking and that because advanced positions in the maintenance field would involve significant speaking, he would be prevented from advancing.

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were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of impairment" within the meaning of 29 U.S.C. § 706(7)(B)(ii).

The government argues that the reason the Postal Service denied Reeder the temporary assignment would not or did not carry over into its decision to deny Reeder the permanent assignment. That is a mistake.

Here, Reeder was denied the detail which lead to the promotion because of a perception (not reality) that he could not speak adequately in any capacity, whether by the phone or otherwise. That is exactly the kind of thought process targeted for elimination in School Board v. Arline, 480 U.S. 273, 284, 107 S.Ct. 1123, 1128 (1987).

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Reeder's impairment was viewed as limiting him not just in his ability to do one particular job with one particular

employer, but in his ability to communicate in any higher level jobs, virtually precluding his advancement.

CONCLUSION AS TO THE FIRST ISSUE

Petitioner averred specific facts needed to raise a genuine issue of material fact as to the substantiality of his impairment. Indeed, it is difficult to see how he could be more specific in his deposition as to how his impairment limited his work dealings: his coworkers have difficulty understanding him "every day at work", he has trouble communicating "about 90% of the time", or how he could be more specific as to his various surgeries, the two years of injections into his voice box, his reasons for giving up hope of finding a cure, or how he could be more specific as to the relationship between the detail he was denied because of his speech and the permanent position he was seeking.

There was sufficient evidence from which a jury could conclude that Reeder satisfied at least one of the tests of being a person

with a handicap. Certainly, the evidence raised a genuine question of fact and summary judgment was improper.

REPLY TO THE GOVERNMENT'S ARGUMENT ON WHETHER §504 OF THE REHABILITATION ACT PROVIDES FOR A PRIVATE CAUSE OF ACTION

With respect to the issue of whether federal (and Postal Service) employees have rights under Section 504 of the Rehabilitation Act (29 U.S.C. §794) and may sue federal agencies under §504 for violations of those rights, the government argues that the issue is of little practical significance because "there is no clear advantage to suing under Section 504." (Resp. brief at 9)

Reeder concedes the "advantage" may not be clear, but the advantage may be very significant to this Plaintiff and any federal employee plaintiff. The advantage plaintiff seeks is to recover compensatory damages.

A growing number of lower courts have held that a plaintiff who sues under §504 may be able to recover compensatory damages and

by logical extension have a jury trial.[4] Recent cases include Cortes v. Board of Governors, 766 F.2d 623 (N.D. Ill. 1991); Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (Colo. 1992); Doe v. District of Columbia, ____ F.Supp. ____, 59 FEP 363, (D.D.C. 1992).

The government argues that, with the exception of Cortes v. Board of Governors, none of the cases in this developing line have interpreted §504 to permit federal employees suing the federal government to seek compensatory damages.

That may be the case. But it is the case only because the trend is so recent, not because courts have affirmatively decided

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[4]Earlier cases include Miener v. Missouri, 673 F.2d 969, 973 (8th Cir. 1982), cert. denied, 459 U.S. 909, 103 S.Ct. 215, 74 L.Ed 2d 171 (1982); Ciampa v. Massachusetts Rehabilitation Comm'n, 718 F.2d 1, 5 (1st Cir. 1983); Nelson v. Thornburgh, 567 F.Supp. 369 (E.D. Pa. 1983), affirmed w/o opinion, 732 F.2d 147 (3rd Cir. 1984), cert. denied, 469 U.S. 1188, 105 S.Ct. 955, 83 L.Ed 2d 962 (1985). See specifically Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 2825 (1991).

against extending the law to apply to the federal government. The path may not be well traveled, but at least it's in the right forest.[5]

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[5] Resort to Wood v. Trustees of Spring Hill Cottage, 978 F.2d 1214, 1219 (11th Cir. 1992), as authority is full of problems. In Lengen v. Dept. of Transportation, 903 F.2d 1464 (3rd Cir. 1990), which the 11th Circuit cites as its precedent for Wood, the 11th Circuit did not even reach the issue of whether a federal employee had a private right of action against the federal government under §504. Indeed, the Wood court expressly limited the holding in Lengen to actions under §501 (29 U.S.C. §791) for which compensatory damages are not available, or at least were not available at the time. More importantly, the Wood case didn't involve the federal government as a defendant. Had Ms. Wood been a federal employee and sued the federal government for compensatory damages under §504, the 11th Cir. may very well have found compensatory damages were permissible on a showing of intentional discrimination. See Wood at 1219-1220:

> This Circuit has held that plaintiffs who proceed under a theory of disparate treatment in Section 504 actions must prove intentional discrimination or bad faith in order to recover compensatory damages... In addition, controlling precedent on Title VI remedies, made applicable to section 504 actions under the Rehabilitation Act, indicates that compensatory damages ... are permissible on a showing of intentional discrimination.

In any event, while there may have been resistance in the past to recognizing a cause of action in federal employees under §504 or permitting compensatory damages against the federal government, such resistance is now on very thin ice by virtue of the Court's decision in Franklin v. Gwinnett County Public Schools, 503 U.S. ____, 112 S.Ct. 1028, 1035, 117 L.Ed 2d 208 (1992).

If the Court follows Franklin, the Court should determine that §504 does not specify the relief obtainable and that Congress has not expressly (or otherwise) disallowed compensatory damages under §504.

Thus, if, as Reeder argues, Reeder has a right under §504 to sue the Postal Service for the discrimination alleged, he should be able to recover compensatory damages. See Franklin, 112 S.Ct. at 1035:

> Absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable

cause of action brought pursuant to a federal statute.

Applying §504 to suits by an employee of the federal government and permitting recovery of compensatory damages may just be a matter of the proper post-Franklin federal employment case reaching the Court. This is such a case.[6]

CONCLUSION AS TO THE SECOND ISSUE

If the Court determines that Reeder does raise a genuine fact question as to the

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[6] Permitting recovery of compensatory damages under §504 as against the federal government is in harmony with Congress' action in passing the Civil Rights Act of 1991. The passage of the Civil Rights Act of 1991, however, requires Petitioner to concede that because the language of §501 of the Rehabilitation Act (which incorporates the procedures and remedies of Title VII), now probably incorporates the amendments made to Title VII by the Civil Rights Act of 1991, §501 now probably provides plaintiffs with an avenue to recover compensatory damages. Thus, whether Reeder needs to resort to §504 to seek compensatory damages depends on whether the 1991 Act changes are to be applied retroactively. Only if the Court determines the 1991 Act is not to be applied retroactively, will the issue of whether §504 provides a cause of action for compensatory damages have continuing significance.

substantiality of his impairment so as to come within the protection of the Act, the Court should resolve the conflicts between the Circuits as to §504 of the Rehabilitation Act. The petition for writ of certiorari should be granted.

Respectfully submitted this 20th day of August, 1993.

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